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# In the Supreme Court of the United States

OCTOBER TERM, 1982

MANCHESTER ENVIRONMENTAL COALITION AND MICHAEL DWORKIN, PETITIONERS

*v.*

ENVIRONMENTAL PROTECTION AGENCY, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

## BRIEF FOR THE RESPONDENTS IN OPPOSITION

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## QUESTION PRESENTED

Petitioner's petition for review of action by the United States Environmental Protection Agency under the Clean Air Act was granted only in part, and denied for the most part. The court of appeals, moreover, rejected all of petitioner's arguments, and granted relief different from that sought, on a theory petitioners did not advance. Petitioners' applications for costs and attorneys fees under Section 307(f) of the Clean Air Act were technically deficient. The court of appeals denied these applications without issuing any opinion.

The question presented is: whether the denial of the cost and fee applications was in these circumstances an abuse of discretion.

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### OPINION BELOW

The court of appeals' orders: (1) denying petitioners' motion for an award of costs (Pet. App. 51A), (2) denying petitioners' motion for an award of attorneys' fees (Pet. App. 54A), (3) denying petitioners' motion for reconsideration of the foregoing orders (Pet. App. 34A), and (4) rejecting petitioners' suggestion for en banc consideration of the motion for reconsideration, are not reported. The opinion of the court of appeals on the merits of the underlying petition for review (Pet. App. 1A-32A) is reported at 672 F.2d 998.

## JURISDICTION

The orders of the court of appeals denying the motions for awards of costs and attorneys' fees were entered on April 9, 1982. A motion for reconsideration was denied on May 14, 1982, and en banc consideration was denied on June 15, 1982.[1] The petition for a writ of certiorari was filed on August 11, 1982.[2] The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. This case arises indirectly from a petition for review filed by petitioners and the Connecticut Fund for the Environment challenging the Environmental Protection Agency's approval of a revision of the Clean Air Act State Implementation Plan of the State of Connecticut.[3] The agency conditionally approved the State's plan for meeting the requirements of Part D of the Act, 42 U.S.C. (Supp. IV) 7501-7508, added by 1977 Amendments thereto, and approved Connecticut's partial withdrawal of its program for preconstruction review of indirect sources of pollution. The court of appeals vacated a portion of the conditional

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[1]The motion for reconsideration was filed April 26, 1982 (Pet. App. 34A) and may accordingly have been untimely. See Fed. R. App. P. 40(a). It was nonetheless denied rather than being rejected for filing. The suggestion for en banc consideration is dated May 13, 1982 — one day before the denial of the reconsideration request by the panel, and appears to have been prepared prior to action by the panel upon the reconsideration request, but was not filed until May 24, 1982. The rules of the Second Circuit apparently precluded filing of the request for en banc consideration until the panel had acted. See 2d Cir. R. 27(i).

[2]It was accordingly filed within the time allowed by law if the motion for reconsideration is deemed to have been timely filed. See note 1, *supra*.

[3]Although the present petitioners and the Connecticut Fund for the Environment joined in a single petition for review they were permitted to file separate briefs in the court of appeals.

approval of the state plan, on grounds not advocated by petitioners, and otherwise upheld EPA's actions (Pet. App. 1A-32A). Judgment was entered on the petition for review on February 1, 1982.

On March 3, 1982, some 30 days after entry of judgment by the court of appeals, petitioners' motion for a bill of costs (Pet. App. 50A-51A) and motion for attorneys' fees (Pet. App. 53A-54A), each dated February 23, 1982, were filed with the court of appeals. The application for attorneys' fees was not supported by a detailed record of attorney time expended on the case.[4] Respondents opposed any award of attorneys' fees on the grounds: (1) generally, that an award of fees is not appropriate in the circumstances of this case,[5] and (2) that petitioners' motivation in seeking review of the agency's action appeared to be an anticompetitive private economic interest rather than an interest in advancing the goals of the Clean Air Act. The government further challenged the amount of the fee award requested as excessive on the grounds that: (1) the present petitioners and the Connecticut Fund for the Environment had both sought

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[4]Petitioners' Motion for Reconsideration (Pet. App. 33A-49A) states (*id.* at 36A, para. 10) that an affidavit dated February 25, 1982 "detail[ed] all background information [petitioners' counsel deemed] relevant to an award of attorney's fees and costs." A copy of that affidavit is attached to the reconsideration motion (Pet. App. 38A-43A). We note that petitioners do not indicate when the affidavit in question was filed, and that the actual motion for attorneys' fees (Pet. App. 53A-61A) neither includes nor contains any reference to such an affidavit. According to our records, the affidavit in question was not served until it was included together with a motion for leave to file the costs and attorneys' fees motions out-of-time, and a reply to the government's opposition to the motion for fees, all dated April 5, 1982.

[5]Respondents challenged as inaccurate petitioners' claims that their petition for review required the court of appeals to address a matter of first impression under the Clean Air Act, and that amicus briefs had been submitted reflecting substantial public interest in this case. In fact, no such briefs had been filed.

attorneys' fees without any adjustment reflecting the substantial overlap between their briefs (see page 2 note 3, *supra*),[6] (2) the petition for review had been sustained only in part, and in that respect only upon a rationale not articulated by petitioners, and (3) neither the hours expended nor the hourly rate claimed had been properly documented. (See page 3 note 4, *supra*). The government opposed the motion for a bill of costs on the grounds that the motion was untimely, and noted that the costs claimed should be reduced to reflect the fact that the petition for review was only partially successful and to disallow so much of the cost of postage claimed as was attributable to service mistakenly effected by petitioners upon counsel from a different case. Petitioner's reply to the government's opposition (see page 3 note 4, *supra*) was dated April 5, 1982.[7]

On April 9, 1982, the court of appeals denied both the motion for a bill of costs and the motion for an award of attorneys' fees without issuing any opinion (Pet. App. 51A, 54A). A motion for reconsideration, filed April 26, 1982, was denied on May 14, 1982 (Pet. App. 34A), and a suggestion for en banc consideration of the last motion, filed May 24, 1982, was rejected on June 15, 1982 (see page 2 note 1, *supra*).

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[6]The application of the Connecticut Fund for the Environment for attorneys' fees remains pending before the Second Circuit; CFE's separate motion for costs was denied on April 9, 1982.

[7]It is unclear from the record when this reply was received by the court of appeals. The Clerk of the court of appeals has informed us that his records indicate that it was received on April 9, 1982 — the very day the court ruled on the underlying motion. Although we cannot be certain whether it was received prior to the court's action, it may be significant that the court of appeals apparently did not act upon petitioners' motion for leave to file its applications out-of-time (see page 3 note 4, *supra*), perhaps because the court had already acted upon the underlying applications by the time that motion was received.

## ARGUMENT

The court of appeals did not abuse its discretion in denying an award of costs or attorneys' fees in the circumstances of this case. The disposition of these applications without an opinion merely settles rights between the parties to this case and establishes no precedent, much less one of general importance. Review by this Court accordingly is not warranted.

1. Petitioner suggests (Pet. 3-7) that review should be granted in this case to afford guidance to the lower courts in determining when an award of attorneys' fees is "appropriate" within the meaning of Section 307(f) of the Clean Air Act, 42 U.S.C. (Supp. IV) 7607(f). We agree with petitioners that that question stated in the abstract is an important one with significant unsettled aspects. Indeed, the Court has recently granted our petition for a writ of certiorari in *Sierra Club* v. *Gorsuch*, 672 F.2d 33 (D.C. Cir. 1982), cert. granted, No. 82-242 (Oct. 18, 1982), which presents the question whether it can be "appropriate" to award fees under Section 307(f) to a party that has not prevailed upon any aspect of its petition for review, where the decision of the court of appeals upholds the agency's action in all respects. But, unlike *Gorsuch* v. *Sierra Club*, this case is an inappropriate vehicle for clarification of the law, because the court of appeals did not purport to announce any standard governing the availability of attorneys' fees. For this reason, not only does the decision below fail to conflict with any decision of this Court or of any court of appeals, it presents no question to be reviewed by this Court. See *United States* v. *Mitchell*, 445 U.S. 535, 567 n.7 (1980).[8]

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[8]A fortiori this case presents no occasion to afford "guidance [to the lower courts respecting] calculat[ion] [of] the amount of attorney's fees to be awarded in any given case" (Pet. 7). Petitioners has not suggested any conflict of authority on this score (see Pet. 7-8) and even if, as

2. Nor does the court of appeals' failure to render an opinion in this case itself warrant review. None of the decisions cited by petitioner (Pet. 8) for the proposition that denial of fees without an explanation is an abuse of discretion treats the statute at issue here, Section 307(f) of the Clean Air Act. Nor do any of these decisions deal with the award of fees upon petition for review. Plainly, the necessity for rendition of findings and conclusions explaining the disposition of a fee request is much less when the disposition is not subject to judicial review as of right, for establishing a record for appellate review is the primary purpose of such findings. Compare, e.g., *Kerr* v. *Screen Extras Guild, Inc.*, 526 F.2d 67, 69 (9th Cir. 1975); *Johnson* v. *Georgia Highway Express, Inc.*, 488 F.2d 714, 717 (5th Cir. 1974). Moreover, the requirements of Fed. R. Civ. P. 52(a) are not applicable here.

It may well be that the better practice would have been for the court of appeals to explain its decision, at least briefly by an appropriate memorandum. That said, however, we can see no occasion for further review in this case. First, as is explained below (pages 7-9), the denial of attorneys' fees in this case was not an abuse of discretion. In these circumstances, to vacate the order of the court of appeals denying fees and costs and remand for further proceedings would be a sterile exercise that would needlessly prolong this litigation. A case such as this is not a suitable vehicle for establishing criteria for the disposition of attorneys' fees applications without opinion.

Second, the practice of summary disposition without opinion is regularly employed by the courts of appeals, not only for ancillary motions, but for disposition of appeals

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petitioner suggest, there is some lack of uniformity in the application of generally agreed upon criteria for computing fees awards, this case, in which no standard was announced and no fee awarded, surely is not an appropriate vehicle for clarifying the law.

upon the merits, in cases where the proper disposition is deemed clear, no precedent is needed or created, and the disposition is fact-bound rather than based upon recurring questions of general importance.[9] Such summary dispositions, if not abused, are an acceptable response to the problem of judicial management created by burgeoning caseloads. Absent a showing that the practice has been systematically abused in acting upon applications for award of attorneys' fees for legal services rendered upon petition for review, we suggest that there is no compelling reason for this Court to intervene to bar use of this practice.

3. The denial of attorneys' fees to petitioners' counsel in this case entails no abuse of discretion.[10] The court of appeals could properly have determined that no award of fees or costs is appropriate because the court did not grant the relief sought by petitioners and rejected each of their legal arguments.[11] Even if petitioners can be said to have

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[9]See D.C. Cir. R. 13(c); 1st Cir. R. 14; 2d Cir. R. 0.23; 4th Cir. R. 7(b); 5th Cir. R. 21; 6th Cir. R. 9(d); 8th Cir. R. 14; 9th Cir. R. 21; 10th Cir. R. 17(b); 11th Cir. R. 25.

[10]The statutory criterion for an award — a judicial determination that an award is "appropriate" (42 U.S.C. (Supp. IV) 7607(f)) — necessarily invests the courts of appeal with a degree of discretion. Petitioner does not suggest that the courts of appeals are totally without discretion in determining whether fees are to be allowed.

[11]The agency action challenged was the EPA's conditional approval of Connecticut's State Implementation Plan ("SIP") revisions and its approval of partial withdrawal of the State's indirect source review program. Petitioners argued that the agency was not authorized to conditionally approve a SIP revision, and that if so authorized, EPA's conditional approval of Connecticut's SIP revision was arbitrary and capricious. They also argued that the conditional approval could not serve as a predicate authorizing rescission of the indirect source review program. The court of appeals rejected all of those arguments (Pet. App. 12A-14A, 17A-25A). Instead, it ruled, essentially sua sponte (*id.* at 14A-17A), that although the conditional approval of Connecticut's SIP revisions was authorized and appropriate, it was not sufficient to lift the

prevailed in part in a technical sense, the fact that the arguments devised by counsel were not responsible for the result achieved suggests that petitioners need not be rewarded for contributing substantially to the attainment of the goals of the Clean Air Act. See *Sierra Club* v. *Gorsuch, supra,* 672 F.2d at 39. Just as the language of Section 307(f) may permit a party to recover attorneys' fees in some circumstances without formally prevailing by securing entry of a favorable final judgment,[12] when a party technically prevails upon a petition for review without significantly advancing the goals of the Clean Air Act an award of fees may be inappropriate. Cf. *Carpenter* v. *Andrus,* 499 F. Supp. 976 (D. Del. 1980) (denying fees to a prevailing plaintiff under the Endangered Species Act).[13] In short, petitioners have not demonstrated that the denial of attorneys' fees and costs to them was inconsistent with the policy or provisions of the Clean Air Act.

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statutory new source construction moratorium imposed by Congress on States without SIPs consistent with the 1977 Amendments to the Clean Air Act. Accordingly, the court of appeals vacated only that portion of the EPA order which purported to suspend the construction moratorium (*id.* at 25A). We note that the argument embraced by the court of appeals was espoused neither by these petitioners, nor by the Connecticut Fund for the Environment (see page 2 note 2, *supra*).

[12]See our petition in *Gorsuch* v. *Sierra Club,* No. 82-242, at 16-19. A copy of that petition has been served upon counsel for petitioner herein together with this brief.

[13]In denying an award of fees or costs the court of appeals could also properly have considered evidence placed before the court by the government that petitioners' participation in this litigation was motivated by private economic self-interest, and concluded that such persons need no special incentive to serve as private attorneys general. See *Alabama Power Co.* v. *Gorsuch,* 672 F.2d 1, 7 n.33 (D.C. Cir. 1982).

The court of appeals may also have been moved to deny petitioners' applications without opinion because of technical deficiencies therein. As noted above (page 3 & note 4), the original motion for attorneys' fees did not include necessary documentation concerning the time expended. It is not clear whether the supplemental documentation tardily supplied reached the court of appeals in a timely manner (see page 4 & note 7, *supra*), and it would not have been an abuse of discretion to decline to reconsider the court's disposition in response to a tardy submission. Even after supplementation of their papers, petitioners offered no support for the hourly rate of compensation claimed — $100 an hour. Given that petitioners' contribution to the result reflected in the court of appeals' opinion was at best marginal, the defective applications for attorneys' fees and costs were properly denied.[14] Under the circumstances no recurring question of general importance is presented by that denial.

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[14]We note that petitioners' motion for a bill of costs was untimely under Fed. R. App. P. 39(d). The question whether an application for attorneys' fees is to be governed by the procedural rules that regulate applications for conventional taxable costs appears to be open in this Court. See *White* v. *New Hampshire Department of Employment Security*, No. 80-5887 (Mar. 2, 1982), slip op. 4 n.9 & 9 n.17.

## CONCLUSION

The petition for a writ of certiorari should be denied.[15]

Respectfully submitted.

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[15]We think it unnecessary to hold the petition for possible future disposition in light of a decision in *Gorsuch* v. *Sierra Club*, *supra*. A decision in that case cannot be expected to shed any light upon the permissibility of disposition of fee applications without opinion — the only question directly presented on the record of this case.

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